No. 95-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM FRICKER,

Petitioner,

—vs.—

NEW YORK CITY OFF TRACK BETTING CORPORATION,

Respondent,

—and—

"JOHN DOE,"

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of the United States has jurisdiction under 28 U.S.C. § 1257 to review a state court decision when the petitioner did not exhaust all available remedies at the state level?

2. Whether the Supreme Court of the United States has jurisdiction to review a federal question that was never raised at the state level?

3. Whether the trial court's entire charge sufficiently apprised the jury of the applicable New York Law?

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STATEMENT OF THE CASE

The lawsuit which gives rise to this writ is a routine negligence action of dubious merit. This action was commenced after William Fricker ("petitioner"), was allegedly attacked by an unknown assailant ("John Doe") at a betting parlor owned by the Respondent, New York City Off Track Betting Corporation ("OTB").

The petitioner testified that John Doe, an intoxicated patron, kicked and punched him. While under attack, the petitioner also claims he slipped and fell on a wet floor.

The petitioner claimed that OTB was negligent in failing to maintain the floor and provide security pursuant to Section 605 of the Racing, Pari-Mutual Wagering and Breeding Law and that such failure was the proximate cause of his injury.

The testimony of the petitioner and the OTB clerk revealed that this was a spontaneous event that occurred within seconds and without warning. No proof was adduced that any security could have prevented this event.

The Associate Director of Security for OTB testified that this particular branch was the least troublesome and had the smallest number of incident reports. The petitioner himself testified that he had only witnessed one violent act at this location, when someone broke a clock. This testimony was refuted by a clerk employed by OTB who testified that the clock breaking incident occurred after the petitioner's injury, not before.

After both sides presented their case, the following charge was given to the jury:[1]

> Now, not only must you find there was negligence or a breach of duty or a violation of a specific statute by the defendant, you must find that such violation of statute or

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[1] The portion of the charge which forms the basis of the petitioner's constitutional claim is reprinted here at length.

a breach of other duty, as I will mention to you, was the proximate cause of such negligent conduct, and this caused the injury, before you could hold a defendant liable.

Now, an act or omission is a proximate cause of injury or an accident if it was a substantial factor in bringing about the accident or injury. That is, if it has such an effect in producing the injury or accident, that reasonable people would regard it as a cause of the injury or accident. And, of course, when we say proximate cause, means it was a substantial factor in bringing or causing the injury or accident.

Now, the plaintiff claims that the defendant, OTB failed to comply with, and thus violated, Section 605 of the Racing, Pari-Mutual Wagering and Greeting Law of the State of New York. Hereafter I refer to it as 605 of the Racing Law.

Now, if you find that the defendant violated the statute, and if that violation was a proximate cause of injury or accident to the plaintiff, then, of course, defendant is liable. However, we must address ourselves to the provision of the statute, and I am going to read that to you:

Section 605 of the New York State Racing Law, as I mentioned to you, provides as follows:

Policing Off Track Betting:

1. The corporation shall, at its own expense, provide such policing as may be necessary to preserve order in branch offices and other facilities and premises of the corporation and enforce provisions of this article and the rules and regulations promulgated pursuant thereto.

2. Such policing shall be provided through employees of the corporation designated as special patrolmen by the police commissioner of the city and serving pur-

suant to the provisions of Section 434A-7.0 of the Administrative Code.

When so designated, such special patrolmen, shall, in the branch offices and the other facilities and premises of the corporation and in the areas within 500 feet therefrom, (a) be empowered to perform all functions, perform all laws, rules and regulations mentioned in subdivision (1) of this section; (b) possess all of the duties of regular members of the police force of the city.

Pursuant to Section 604 of the New York State Racing Law, as I mentioned, the rules and regulations that were promulgated and some of these rules and regulations require that certain persons are prohibited from entering into a branch office:

Any person who conducts himself in a manner which is offensive and disturbing of individuals may not enter a branch office or remain there if already in a branch office.

Now, the plaintiff maintains that the failure to have a security guard at the branch office on May 20, 1987, was negligent and was a violation of the law and this was the proximate cause of the accident in which the plaintiff was involved on May 20, 1987 while a patron at the defendant's premises.

The portion of the law, I will read this to you again:

The corporation shall, at its own expense, provide such policing as may be necessary to preserve order in branch offices and other facilities and premises of the corporation and enforce provisions of the law and regulations promulgated pursuant thereto. The key word here which you must consider is, '. . . as may be necessary.' . . . Provide such policing as may be necessary to preserve order in the branch office.

> Now, the plaintiff maintains that based upon previous experience and based upon this law, that the defendant should have had security guards to police the premises and security guards at the particular branch. The defendant maintains that it was not necessary.
>
> * * *
>
> Ladies and Gentlemen of the jury, you are going to be asked to go to the jury room to consider your verdict on this case, and remember we are going to give you the verdict sheet to take with you and also I just wanted to mention something further: that if you find that the defendant was negligent, I have indicated to you that such negligence was a proximate cause of the plaintiff's injury and a proximate cause, you could have more than one proximate cause, but it must be at least a proximate cause of that injury.

The jury found OTB negligent for failing to provide adequate security and for failing to properly maintain the floor. The jury also determined that this negligence was not the proximate cause of the petitioner's injury.

The petitioner appealed this verdict on the grounds that the jury was not properly instructed on proximate cause. The Appellate Division, Second Department affirmed the trial court judgement, indicating that, as a whole, the charge was sufficient. The New York Court of Appeals (the state's highest appellate court) denied the petitioner's motion for leave to appeal.

At no time did petitioner move to reargue the motion for leave to appeal although it was his right to do so.

The petitioner concedes that he never raised the constitutional questions now presented.

REASONS FOR DENYING THE WRIT

The petitioner is not entitled to certiorari since he did not exhaust all legal remedies available to him in the New York Courts and he failed to raise the constitutional issues now before this court even though he had the full opportunity to do so. Further, the Supreme Court of the United States has no jurisdiction since a federal question does not exist. Finally, the jury was properly instructed under New York law.

I

THE PETITIONER FAILED TO FULLY EXHAUST HIS REMEDIES IN STATE COURT AND IS THEREFORE NOT ENTITLED TO CERTIORARI

The Supreme Court of the United States may only review the "final judgment or decrees rendered by the highest state court in which a decision could be had," 28 U.S.C. § 1257.

In this matter, the petitioner has not exhausted all his state remedies. The petitioner's statement in footnote #1 of page 8 of his brief that he had no basis to seek reargument under Rule § 500.11(g), is incorrect. 22 NYCRR 500.11(g) provides the following guidelines for rearguing a New York State Court of Appeals decision:

> **(g) Reargument of Appeals and Motions.**
>
> (1) The motion shall be made without oral argument on 10 copies of a brief or memorandum, reproduced in conformity with section 500.1 of this Part, which shall state briefly the ground upon which reargument is asked and the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portions of the record and to the authorities relied upon.

> (3) The motion may not be based on the assertion for the first time of new points except for extraordinary reasons . . .

This rule does not limit motions to reargue where there was no opinion. It is routine practice in New York to make such a motion.

As the petitioner did not fully exhaust his available remedies at the state level, his petition for a Writ of Certiorari should be denied.

II

THERE IS NO JURISDICTION SINCE THE PETITIONER FAILED TO RAISE A FEDERAL QUESTION BEFORE THE STATE COURT

There can be no Supreme Court jurisdiction under § 1257 unless a substantial federal question has been properly raised in the state court. The underlying policy considerations for this jurisdictional requirement are as follows:

(1) if a federal question was not raised before the state court, the record is most likely inadequate since it was not compiled with the federal question in mind.

(2) the state court should be given the first opportunity to review state law since it might be construed in such a way so as to save it's constitutionality.

(3) A federal question properly raised before the state court may be preempted on an adequate and independent state ground thereby precluding review of a federal issue. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). In addition, the Supreme Court is acknowledging the competency of the state courts by insisting that the state court be given the first opportunity to decide a federal question. *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

It is conceded by the petitioner in his brief that a federal question was never raised in the state court although the opportunity to do so was present during trial, on appeal to the intermediate appellate court, and on motion for leave to appeal to the state's highest court. Significantly, the petitioner did not seek additional redress by seeking reargument although it was his right to do so.

The petitioner argues that he did not raise the constitutional issue in the state courts since he anticipated that the state's highest court would agree with his position concerning intervening cause. He then cites a footnote in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, (1980) as standing for the proposition that a federal question may be raised for the first time in the Supreme Court if the highest state court renders an unexpected decision. *Pruneyard, supra* is easily distinguishable, since there, a general federal claim had been presented to the state court. Moreover, under the facts of this case, the decision of the New York Court of Appeals cannot be considered "unexpected".

The petitioner also cites *Herndon v. State of Georgia*, 295 U.S. 441 (1935), but fails to mention that in *Herndon*, the federal issue was presented in state court. "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon, supra*, at 444. Similarly, in the other cases cited in the petitioner's brief, the aggrieved parties had all filed a rehearing petition in state court to call attention to the federal question. No such petition was made here.

In addition to the above, the petitioner has not made a showing that the decision of the highest state court was a surprise that could not have been reasonably anticipated. (see *Herndon, supra*) The petitioner cannot claim surprise since this was not a matter where a decision was overturned. The intermediate appellate court *unanimously* (4-0) affirmed the

judgment of the trial court before the highest state court *unanimously* (7-0) denied the motion for leave to appeal. Eleven appellate judges of New York State found the jury charge sufficient.

Based on the above, it is respectfully submitted that the Supreme Court of the United States is without jurisdiction over this matter and this petition should be denied.

III

THE JURY WAS PROPERLY CHARGED, THUS THE DOCTRINE OF *STARE DECISIS* WAS VINDICATED

The petitioner's principal contention is that the trial court committed reversible error by not specifically charging the jury on the issue of foreseeability of an intervening cause. While foreseeability of harm is an element to be considered, "these issues *generally* are for the fact finder to resolve". *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308 (1980). (emphasis added). While the New York Court of Appeals in *Derdiarian, supra*, did not address the issue of whether it would be reversible error not to charge the jury specifically on the issue of foreseeability, the above language indicates that this issue should be decided on a case by case basis. Similarly, in *Kush v. City of Buffalo*, 59 N.Y.2d 26 (1983), the Court of Appeals articulated the above standard but did not address the jury charge issue.

The petitioner also cites *Bjelicic v. Lynned Realty Corp.*, 152 A.D.2d 151 (1st Dept. 1989), where the Appellate Division ruled that the trial court had committed reversible error in refusing to charge the jury on the above issue. In *Bjelicic*, the plaintiff was working on a scaffold that was improperly secured. When the plaintiff bent over to pick something up, the scaffold moved and he fell to his death. One of the defendants illegally lent his rigging license and equipment to an unlicensed rigger. It was claimed that the act of negligently

rigging the scaffold was an intervening cause that severed the causal connection between the loan of the license and the injuries. Unlike *Bjelicic*, where there was an affirmative illegal act, the instant case involves an alleged failure to provide adequate security and to keep a floor clean. The alleged intervening act in this case involves the criminal assault undertaken by a third party, whereas in *Bjelicic*, it was claimed that the unintentional negligent act was the intervening act which superseded the intentional criminal act.

In *Bjelicic*, the court also recognized that the jurors had trouble with this issue since they requested, during deliberations, to re-hear the definition of proximate cause. The jurors in this case did not make such a request. Moreover, *Bjelicic* is a decision from the First Department, another intermediate appellate level, and is not binding precedent on the Appellate Division, Second Department or the Court of Appeals.[2] Therefore the doctrine of *stare decisis* is not applicable.

It should also be noted that the New York Court of Appeals has previously determined that the test in determining whether a jury has been adequately charged "is always whether the jury, hearing the whole charge, would gather from it's language the correct rules which should be applied in arriving at it's decision". *People v. Russell*, 266 N.Y. 147, 153. (1934).

It is evident from the charge given to the jury (see Respondent's statement of the case, pages 1-3, *supra*), that when viewed in its entirety, the charge was adequate and afforded the petitioner with a fair trial. *Bartlett v. General Electric Co.*, 90 A.D.2d 183 (3rd Dept. 1982). In addition, the petitioner was not prejudiced since the case was straight forward, the issues were simple and the law applicable to the case was fully stated in the charge. *Brown v. City of New York*, 154

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[2] The New York Court of Appeals dismissed the appeal without opinion. *Bjelicic v. Lynned Realty Corp.*, 75 N.Y.2d 947 (1990).

A.D.2d 325 (2nd Dept. 1989). Eleven appellate judges of New York State found the charge adequate.

In light of the foregoing, it is respectfully requested that this petition for a Writ of Certiorari be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: December 28, 1995

Respectfully submitted,

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